M E M O R A N D U M

Department of the City Attorney

To: Honorable Mayor and Members of the City Council

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Subject: Regulatory Options for Medical Marijuana Dispensaries

Date: May 9, 2007

At its regular meeting on May 15, 2007, the City Council will consider various regulatory options available to the City upon the expiration of the urgency ordinance, adopted August 2, 2005, that currently prohibits the establishment and operation of medical marijuana dispensaries within the City. The purpose of this memorandum is to provide the Council with a brief background of applicable state and federal laws in this area, and to provide a legal analysis of each possible regulatory approach.

Background

On August 2, 2005, following previous discussion of the issue during meetings of May 17 and June 7, 2005, the City Council, by a unanimous vote of 5-0, adopted urgency Ordinance number 270, establishing a 45-day moratorium on the establishment and operation of medical marijuana dispensaries. On September 6, 2005, the City Council, by a vote of 4 to 1, voted to extend the initial moratorium for a period of 22 months and 15 days as permitted under state law. State law permits such moratoriums as a vehicle for Cities to study potential zoning measures to protect public safety, health and welfare, but under California Government Code section 65858(f), the moratorium may be extended only once. The current moratorium will expire on July 23, 2007. Thus, the Council should consider the information and regulatory options presented in this report and provide staff with direction as to how the Council would like to proceed.

Discussion

In 1996, California voters enacted the Compassionate Use Act of 1996 ("the Act"), now codified in Health and Safety Code Section 11362.5.[1] The Act permits possession and cultivation of marijuana for limited medical treatment purposes, subject to certain procedural requirements of the Act. Therefore, a person who qualifies and complies with conditions set forth in the Act may legally possess and cultivate marijuana for medical treatment purposes. Stated another way, possession and cultivation of marijuana in full compliance with the Act is a legal activity under California law.

On January 1, 2004, SB 420, entitled the Medical Marijuana Program, now codified in Health and Safety Code Section 11362.7 et seq., went into effect and clarifies, and possibly expands, the scope of the Act. For instance, Section 11362.7(d)(2) allows a single individual to be a primary caregiver[2] to provide medical marijuana to an unlimited number of persons who are qualified patients[3] or persons with identification cards as long as every qualified patient or person with an identification card resides in the same city or county as the primary caregiver. Additionally, SB 420 allows a primary caregiver to receive compensation for "actual expenses" including reasonable compensation incurred for services provided to an eligible qualified patient or person with an identification card to enable that person to use marijuana and payment for out of pocket expenses incurred in providing services.[4]

Medical Marijuana Dispensaries under State Law

The term "medical marijuana dispensary" is not defined by either the Act or the Medical Marijuana Program. However, medical marijuana dispensaries are generally understood by primary caregivers and advocacy groups relying on the statutory language quoted above as the designation for a facility to distribute and sell medical marijuana under the auspices of enabling state law. Although the term is not defined under state law, courts construing the section, while skeptical of large scale distribution facilities, have generally acknowledged that the law, as drafted, appears to contemplate the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of medical marijuana.[5]

While courts thus generally recognize medical marijuana dispensaries as potentially legal under state law, they are very careful to ensure that such facilities are not a pretext for the illegal distribution of marijuana to unqualified patients for strictly recreational purposes. In one case, a California

[1] All statutory references are to the Health and Safety Code Section unless otherwise noted.

[2] A "Primary Caregiver" is defined as "the individual, designated by a qualified patient or by a person with an identification card, who has consistently assumed responsibility for the housing, health, or safety of that patient or person." (Section 11362.7(d).)

[3] A "Qualified Patient" is a person who is entitled to use medical marijuana on the terms and conditions of the Compassionate Use Act, but does not have an identification card. (Section 11362.7(f).)

[4] Section 11362.765(c).

[5] People v. Urziceanu, (2005) 132 Cal.App.4th 747, 785.

Appellate Court determined that a defendant did not qualify as a "primary caregiver" for a large class of patrons of a cannabis club, noting that under the statute, a "primary caregiver" designated by the person who, or for whose benefit, marijuana is possessed or cultivated, must consistently assume responsibility for the housing, health or safety of that person.[6] The court expressed skepticism that the distributor and designated "primary caregiver" of the club actually maintained the specific clinical care-giving relationship required by the statute. Although the Court did confirm that a primary caregiver may serve more than one qualified patient, it made clear that in order to enjoy protection from prosecution, the relationship must be active and more than merely pretextual.[7] Similar decisions have upheld the prosecution of marijuana collectives where "primary caregivers" grow, stockpile and distribute marijuana to hundreds of qualified patients.[8]

Under the statute, the person providing medical marijuana may be the primary caregiver to an unlimited number of persons located in the same city or county, plus one person from outside of that city/county.[9] Thus, to have the benefit of the new law, the qualified patient or person with an identification card will want to identify a primary caregiver in the specific city or county in which the patient is located. This is why medical marijuana advocates desire that each city/county have its own dispensary (or dispensaries), and why residents of one city might be able to use a dispensary in a different city/county.

Dispensaries under Federal Law

Notwithstanding the Compassionate Use Act and the Medical Marijuana Program, federal law still prohibits the possession, cultivation, or distribution of marijuana and any such use is in violation of federal law. Thus, there are circumstances where the possession and cultivation of marijuana is a legally permitted activity under California law, but is a violation of the federal Controlled Substances Act ("CSA").[10]. This is a fundamental tension that has yet to be resolved under either state or federal law. The Supreme Court has not addressed whether the Compassionate Use Act or any other state medical marijuana laws are preempted by federal law, though it has ruled that there is no "medical necessity" defense to marijuana possession under the CSA,[11] and has further ruled that Congress has authority to prosecute individual possession and cultivation of marijuana under the CSA despite state laws decriminalizing such possession.[12] In early 2005, federal drug enforcement

[6] People ex rel Lundgren v. Peron (1997) 59 Cal.App.4th 1383, 1395-1396.

[7] Peron, 59 Cal.App. 4th at 1399 ("There is no prohibition against designating as primary caregiver an individual who also serves in that capacity for others, provided the caregiver…*consistently* provides for the housing, health or safety of the designating patient.").

[8] Urziceanu 132 Cal.App.4th at 773; People v. Rigo (1999) 69 Cal.App.4th 409, 412-416; People v. Trippet (1997) 56 Cal.App.4th 1532, 1543-1551.

[9] Section 11362.7(d)(3).

[10] 21 U.S.C. 801.

[11] U.S. v. Oakland Cannabis Buyers' Club (2001) 532 U.S. 483.

[12] Gonzales v. Raich, (2006) 545 U.S. 1, 7.

agents conducted several raids of medical marijuana dispensaries in both Los Angeles and San Francisco and certain other Northern California cities.

Several recent actions and public statements by state and federal prosecutors have complicated the issue. In November of 2006, the District Attorney in Riverside County opined that the adoption of an ordinance allowing "storefront medical marijuana dispensaries" (which the DA concluded were not permitted under the Act) could subject the council members approving such ordinance to criminal liability for "aiding and abetting" the violation of law. The second was an appearance by an assistant U.S. attorney at a Coachella Valley Area of Governments meeting where the attorney stated that council members could be prosecuted for aiding and abetting the violation of federal law for passing an ordinance that would allow medical marijuana dispensaries. Although we are unaware of any charges filed against local officials in either state or federal court, and believe that such charges would be very difficult to bring given broad sovereign immunity for legislative acts enjoyed by City Council members and the Supreme Court decision in Raich referring to Proposition 215 as "valid California law,"[13] the actions have caused enough concern among City Council members that a Coachella Valley Council member has had State Senator Sheila Kuehl request a broad-ranging opinion from the Attorney General. The Attorney General's opinion is expected to be issued in the Summer of 2007.

In short, state and federal law exist together in an uneasy tension in this area, and neither state courts nor the federal Supreme Court have addressed whether the Act or other state medical marijuana laws are preempted by federal law. The decision in Raich merely upholds congressional authority to criminalize possession under the Controlled Substances Act and for federal law enforcement to prosecute individual possession of marijuana notwithstanding the Compassionate Use Act.

Analysis of Regulatory Approaches Undertaken by California Cities

In the absence of indisputably clear legal authority in this area, California cities have pursued a variety of approaches to regulation of dispensaries. Many Cities, like Milpitas, have adopted moratoriums on such uses, while others have adopted ordinances either prohibiting or regulating dispensaries. A small number of cities allow dispensaries as already-permitted uses under existing zoning. Many smaller jurisdictions have not addressed the issue.

We have identified four regulatory options for addressing medical marijuana dispensaries. We will discuss each in turn, and provide a brief legal analysis of the strengths and weaknesses in each approach.

Option #1: Administer Current Zoning to Include Dispensaries

[13] Raich, 545 U.S. at 7.

Under this approach, the City would recognize medical marijuana dispensaries and classify them under an established use type, such as a medical clinic, medical office, pharmacy, hospital, or health care facility. Depending on how the Planning Department chose to classify the use, dispensaries would be either principal uses permitted as of right, or a use permitted subject to application for a conditional use permit. The primary drawback to this approach would be a loss of control over the imposition of operating conditions. If dispensaries were classified as medical clinics, for example, they would be permitted as of right in the C2 General Commercial district. In this case, the City would have less control over regulating location and placement of facilities, and the dispensaries could potentially operate in close proximity to schools, churches and other sensitive land uses. In addition, unless classified as a use subject to application for a conditional use permit, the City would have no discretion to attach operating, security and licensing conditions on the facility.

Option #2: Adopt an Ordinance Amending the Zoning Code to Prohibit any Land Use Conflicting with Either State or Federal Law

Some cities have adopted ordinances which generally prohibit approval of any land use application whose underlying activity violates either state or federal law. The Planning Department then generally informs applicants wishing to open a dispensary that the ordinance prohibits such application, relying on the Raich decision's reiteration that marijuana continues to be a Schedule 1 drug prohibited under the federal Controlled Substances Act.

A small number of cities (including Pittsburg and Union City) have followed this approach. The ordinances often include findings referring to Section 37100 of the Government Code, which provides that "[t]he legislative body may pass ordinances not in conflict with the Constitution and laws of the State or the United States." Medical marijuana advocates have argued that a local ordinance that merely implements state law does not necessarily conflict with federal law. Groups such as Americans for Safe Access have argued extensively in press releases that California Cities and local law enforcement are bound to uphold and enforce state law, not federal law, and point to the Supreme Court's reference to "valid California law" as evidence that the federal government has not declared dispensaries as illegal *per se*, and that the federal government merely reserves the right to prosecute individual users under the Controlled Substances Act.[14]

We are aware of no litigation challenging this type of ordinance. Indeed, as a practical matter, it is difficult to imagine a judge who would invalidate an ordinance that simply required land use applicants to comply with state and federal law. Nonetheless, because of the uncertainty and close framing of existing federal law on the subject as contained in the Raich decision (which, as we have discussed above, was narrowly tailored to address only Congressional authority under the Commerce Clause to prosecute individual users of medical marijuana, and did not pass on the legality of dispensaries or preemption of the Act or Medical Marijuana Program), we believe that this approach could potentially invite litigation from one of the advocacy groups, who might bring a writ of mandate against the City to test the validity of the approach. Moreover, we believe that if the City

[14] Americans for Safe Access press mailing, "Why Dispensing Collectives and Cooperatives are Critical to Ensuring Safe Access to Medical Marijuana and Why They Must Be Condoned and Protected," March 14, 2005.

wishes to ban dispensaries outright, it may do so more directly as described in Option #4, described below.

Option #3: Adopt an Ordinance Regulating Medical Marijuana Dispensaries

State law grants cities with express authority to regulate the use of medical marijuana. Section 11362.83 of the Health and Safety Code states: "[n]othing in this article shall prevent a city or other local governing body from adopting and enforcing laws consistent with this article." Accordingly, many California cities have adopted ordinances adding chapters to their zoning code which define "Medical Marijuana Dispensary" and provide extensive regulations respecting facility location, operation and security. Many cities have adopted regulatory ordinances that permit dispensaries that comply with zoning requirements, including Berkeley, Oakland, Citrus Heights, South San Francisco, Santa Cruz, Hayward, Martinez and Santa Rosa.

Such ordinances typically confine dispensaries to certain zoning districts (often including minimal distance requirements from schools, churches, parks, child care facilities, residentially-zoned property and other sensitive uses). Regulatory ordinances often require medical marijuana dispensaries to obtain a conditional use permit, which allows City staff to impose conditions of approval, including provision of adequate parking, minimal security requirements, prohibitions against smoking of medical marijuana on the premises, or consumption of medical marijuana, or marijuana enhanced products (e.g., food made with marijuana) on the premises of the medical marijuana dispensary, and adequate trash collection and disposal. Many of these regulatory ordinances additionally require applicants to obtain city business licenses. Other regulatory requirements include limitations on operating hours, limits on the number of plants and dried marijuana allowed on the premises, background criminal checks for employees, record keeping requirements, access to books and records, payment of regulatory fees, and periodic review of operations by code enforcement or Planning Commissions.

Option #4: Adopt an Ordinance Prohibiting Dispensaries

At least 19 cities have adopted ordinances banning medical marijuana dispensaries altogether. Although such bans are controversial and tend to invite challenges from advocacy groups, we believe that such a ban is defensible under state law and the City's broad police power to protect public health, safety and welfare. Nothing in either the Act or the Medical Marijuana Program contains an affirmative mandate that cities or counties enact regulatory schemes to allow for establishment of dispensaries. As discussed above, state law grants cities authority to pass ordinances that do not conflict with the states medical marijuana laws. Medical marijuana advocates generally point to the Urziceanu decision as evidence that state courts recognize dispensaries under state law, but a close reading of the decision suggests only that state courts will allow evidence of collective cultivation in accordance with state law as an affirmative defense to criminal charges for possession and cultivation.[15] Nothing in the decision, or any of the other cases we have reviewed, suggests that cities have an affirmative obligation to permit medical marijuana facilities as a land use

[15] Urziceanu, 132 Cal.App.4th at 773.

authority. Moreover, sections of the Health and Safety Code suggest that such bans are consistent with state marijuana laws. For example, California Health and Safety Code section 11362.5 (b)(2) provides that "[n]othing in (the relevant) section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for non-medical purposes." Ordinances banning collectives frequently include extensive findings detailing the numerous adverse secondary impacts associated with dispensaries, including increased criminality, loitering, drug abuse, traffic and noise impacts.[16] Cities which have adopted bans include Concord, Dublin, El Cerrito, Fresno, Modesto and Hercules.

Although we believe that such bans are defensible under state law, their legality has not been yet affirmed by a judicial decision. ASA has filed suit against a number of cities which have adopted bans, including the cities of Concord, Fresno, Pasadena and Susanville. In late 2006, ASA dismissed its lawsuits against the cities of Fresno and Susanville shortly before a demurrer to the matter was scheduled for hearing. This suggests at least that ASA finds the cities' rationale for defending the ban persuasive. Nonetheless, ASA continues to actively contest the legality of these bans in at least two cities, and until the matter is decided by a court, there is a chance that the adoption of an outright ban could invite litigation.

Conclusion

The law regarding medical marijuana dispensaries in California is unsettled and evolving. Our review of this area suggests that cities wishing to regulate dispensaries may adopt comprehensive regulatory ordinances consistent with state marijuana laws. If the Council wishes to permit dispensaries, it should provide staff with specific direction as to the types of operations and security restrictions it would like to see in the regulatory ordinance. We also believe that the Council may adopt an ordinance banning dispensaries outright, but caution that this approach could potentially invite litigation. The City Council should discuss the matter and provide staff with direction as to how to proceed. Our office can then work closely with the Planning Department to draft an ordinance with appropriate findings that responds to the Council's direction, and which we can bring back to the Council in time for adoption and an effective date prior to the expiration of the current moratorium on July 23.

[16] The California Police Chief's Association has compiled an extensive report detailing negative secondary effects associated with medical marijuana dispensaries. The report is available online at http://www.californiapolicechiefs.org/nav_files/research/pdfs_ords/_el_cerrito_ord.pdf.